

Research Article

# The ICC Limits in Prosecuting the Crime of Aggression: Re-examining Article 15 Bis 5 of the Rome Statute in the Context of Russia's Invasion of Ukraine

Sem Amin\* 

Public Law Department, Mzumbe University, Morogoro, Tanzania

## Abstract

Aggression is one of the core international crimes for which the International Criminal Court (ICC) has been vested with the power to prosecute when member states are unwilling or unable to do so. Article 8 bis 3 of the Rome Statute defined aggression to mean the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations. However, Article 15 bis 5 of the Rome Statute provides that, in respect of a State that is not a party to the Rome Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory. This provision waives the ICC's mandate to prosecute aggressors, thereby creating impunity. Therefore, this Article addresses the legal implications arising from Article 15 bis 5 of the Rome Statute, which restricts the ICC's jurisdiction to prosecute the crime of aggression when committed by nationals of states not party to the Rome Statute.

## Keywords

International Criminal Court, ICC Jurisdiction, Aggression, Jurisdictional Limits, Rome Statute, Article 15 Bis 5

## 1. Introduction

A State which becomes party to the Rome Statute accepts the jurisdiction of the ICC. Article 4(2) of the Rome Statute puts forth that the ICC may exercise its functions and powers, as provided in the Rome Statute, on the territory of any State Party and, by special agreement, on the territory of any other State. The ICC has the mandate of exercising jurisdiction based on the core international crimes, which are genocide,

war crimes, crimes against humanity, and aggression, as per Article 5 of the Rome Statute.

The ICC lacks jurisdiction to prosecute individuals from non-state parties for aggression, as stated under Article 15 bis 5 of the Rome Statute<sup>1</sup>. Hence, through the article, individuals from non-state parties to the ICC will not be prosecuted. So, the aggressors will remain free, which infringes the doctrine

<sup>1</sup> The Rome Statute is the founding treaty of the International Criminal Court (ICC), adopted on July 17, 1998, and in force since July 1, 2002. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction

over the crime of aggression when committed by that State's nationals or on its territory.

\*Correspondence: Sem Amin (sem.mnzava@mu.ac.tz)

Received: 22 April 2026; Accepted: 11 May 2026; Published: 21 May 2026



Copyright: © The Author(s), 2026. Published by Science Publishing Group. This is an **Open Access** article, distributed under the terms of the Creative Commons Attribution 4.0 License (<http://creativecommons.org/licenses/by/4.0/>), which permits unrestricted use, distribution and reproduction in any medium, provided the original work is properly cited.

of justice.

The purpose of establishing the ICC is to ensure those who commit international crimes face the hand of justice. Therefore, having a provision that restricts the ICC from exercising its jurisdiction undermines the very notion of justice and the ideal of making the world a safe place for human beings. Therefore, this Article focuses on discussing the legal implications of Article 15 *bis* 5 of the Rome Statute with reference to Russia's invasion of Ukraine, the way forward, and lastly, the conclusion.

## 2. Methodology

This article adopted doctrinal legal methodology. The researcher analyzes and contextualizes both primary and secondary legal sources, as well as other relevant jurisprudence and literature, to elaborate on the topic of this study. This method is thought to be relevant as it could provide quick information relevant to this study.

## 3. Jurisdiction of the ICC

The ICC is the first permanent treaty-based international tribunal to deal with individual criminal responsibility [1] for the most serious international crimes of concern to the international community as a whole, where national jurisdictions are unwilling or unable genuinely to investigate or prosecute. The idea of a system of international criminal justice re-emerged after the end of the Cold War<sup>2</sup>. However, while negotiations on the ICC Statute were underway at the United Nations, the world was witnessing the commission of heinous crimes in the territory of former Yugoslavia and in Rwanda. In response to these atrocities, the United Nations Security Council established an ad hoc tribunal for each situation. These events undoubtedly had a significant impact on the decision to convene the conference that established the ICC in Rome in 1998. The ICC represents a significant step forward in terms of the implementation of international criminal law because it not only contributes to the development of international norms but also ensures their application in concrete cases of disrespect, with a direct impact on national and international levels (International Law and Domestic [Municipal] Law, Law and Decisions of International Organizations and Courts) [2].

Therefore, the ICC has jurisdiction to prosecute serious international crimes as stated in the Rome Statute of the ICC.

The Statute provides that the ICC shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in the Statute, and shall be complementary to national criminal jurisdictions.<sup>3</sup> Article 42(1) of the Rome Statute states that the Office of the Prosecutor (OTP) shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the ICC, for examining them, and for conducting investigations and prosecutions before the Court. The international crimes within the jurisdiction of the ICC are as follows:

### 3.1. Genocide

Genocide was first enshrined under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide [3]. Before 1948, acts that amounted to genocide documented during World War II were never articulated as crimes of genocide in the International Military Tribunal (IMT) and International Military Tribunal for the Far East (IMTFE).

Genocide was established for the first time by the Convention on the Prevention and Punishment of the Crime of genocide of 1948<sup>4</sup>. The subsequent instruments, such as the ICTR statute<sup>5</sup>, ICTY statute<sup>6</sup> and the Rome Statute<sup>7</sup> also recognize genocide as an independent crime, different from crimes against humanity.

ICTR, ICTY and Rome statutes respectively define crime of genocide to mean that any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group<sup>8</sup>.

For genocide to be established, there must be an intention to destroy in whole or in part a national, ethnical, racial, or religious group [4]. The intention to destroy marks the mental element (*mens rea*) of the crime of genocide. The intention to destroy in whole or in part must be directed to a national, ethnical, racial, or religious group. This element of intention is to the effect that the crime of genocide is directed towards a group and not an individual.

Apart from the mental element, the definition of genocide incorporates the conduct (*Actus reus*) committed with the intent to destroy in whole or in part a national, ethnical, racial,

2 The Cold War was a prolonged geopolitical and ideological struggle between the United States and the Soviet Union from 1945 to 1991, marked by rivalry, proxy wars, and an arms race without direct combat between the superpowers.

3 (n 1) article 1.

4 Article II and III respectively provide, In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent

births within the group; (e) Forcibly transferring children of the group to another group. The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.

5 Article 2, The International Criminal Tribunal for Rwanda of 1994

6 Article 4, The Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/RES/827 (1993).

7 Article 6, (n 1)

8 Article 2(2) ICTR statute, Article 4(2) ICTY statute, Article 6 Rome statute.

or religious group that will amount to genocide. The conduct mentioned in the definition includes killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group and forcibly transferring children of the group to another group.

### 3.2. War Crimes

War crimes are a serious violation of international humanitarian law<sup>9</sup>. The Rome Statute defines war crimes to mean:

Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: Wilful killing; Torture or inhuman treatment, including biological experiments; Wilfully causing great suffering, or serious injury to body or health; Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; Unlawful deportation or transfer or unlawful confinement; Taking of hostages<sup>10</sup>.

Unlike genocide, war crimes were articulated in the IMT and the IMTFE Charters.<sup>11</sup> Furthermore, the tribunals that were established after the first set in 1945 equally deal with war crimes.<sup>12</sup> It can therefore be seen that from the Nuremberg trials to date, several persons have been prosecuted and convicted on counts of war crimes.<sup>13</sup> The definitions contained in these Charters have affirmed the customary nature of the prohibitions under the Geneva Conventions and Additional Protocols [5].

In the case of the Prosecutor v Thomas Lubanga Dyilo [6]. The accused was found guilty, on 14 March 2012, of the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities (child soldiers). He was sentenced, on 10 July 2012, to a total of 14 years of imprisonment. The verdict and sentence were confirmed by the Appeals Chamber on 1 December 2014. On 19 December 2015, Mr. Lubanga was transferred to a prison facility in the DRC to serve his sentence of imprisonment. In another case, the former Chief of Staff and commander of the

forces Patriotiques pour la Liberation du Congo (FPLC), Bosco Ntaganda [7] was found guilty, beyond a reasonable doubt, of 18 counts of war crimes and crimes against humanity, committed in Ituri, DRC, in 2002-2003. On 7 November 2019, Bosco Ntaganda was sentenced to a total of 30 years of imprisonment.

The above cases confirm that the violators of international humanitarian law proven to amount to war crimes are prosecuted and, when found guilty, are sentenced. Therefore, all acts mentioned in Article 8(2)<sup>14</sup> When committed during armed conflicts are termed as war crimes.

### 3.3. Crimes Against Humanity

It is not clear in which context and at what exact time the term “crimes against humanity” was first developed. Some scholars [8] point to the use of this term (or very similar terms) as early as the late eighteenth and early nineteenth centuries. They argue that the term “crimes against humanity” was particularly used in the context of slavery and the slave trade. It was also used to describe atrocities associated with European colonialism in Africa and elsewhere, such as the atrocities committed by Leopold II of Belgium in the Congo Free State. Other scholars [9] point to the declaration issued in 1915 by the Allied governments (France, Great Britain, and Russia) condemning the mass killing of Armenians in the Ottoman Empire, as the origin of the use of the term as the label for a category of international crimes.<sup>15</sup>

The Rome statute defines the crimes against humanity to mean acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar

9 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention relative to the Treatment of Prisoners of War; and Geneva Convention relative to the Protection of Civilian Persons in Time of War.

10 Article 8(2), (n 1).

11 Charter of the International Military Tribunal, article 6(d) and IMTFE Charter. The prohibition and punishment of war criminals can be deduced from Article 229(2) of the Treaty of Versailles of 28 June 1919.

12 Statute of the International Criminal Tribunal for Rwanda, article 4 deals with violations of Article 3 common to the Geneva Conventions and Additional Protocol II; Statute of the International Tribunal for the Former Yugoslavia, article 2 deals with grave breaches of the Geneva Convention of 1949.

13 Example cases such as the Prosecutor v. Tadic; Prosecutor v. Akayesu; Prosecutor v. Furundzija; Prosecutor v. Kayishema; Prosecutor v. Musema; Prosecutor v. Norman and Prosecutor v. Thomas Lubanga.

14 (i) Wilful killing; (ii) Torture or inhuman treatment, including biological experiments; (iii) Wilfully causing great suffering, or serious injury to body or health; (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial; (vii) Unlawful deportation or transfer or unlawful confinement; (viii) Taking of hostages

15 UN, <https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml> accessed on 20 April 2026.

character intentionally causing great suffering, or serious injury to body or to mental or physical health.<sup>16</sup>

In contrast with genocide, crimes against humanity do not need to target a specific group; instead, the victim of the attack can be any civilian population, regardless of its affiliation or identity. Another important distinction is that in the case of crimes against humanity, it is not necessary to prove that there is an overall specific intent. It suffices for there to be a simple intent to commit any of the acts listed, except the act of persecution, which requires additional discriminatory intent.<sup>17</sup>

### 3.4. The Crime of Aggression

Aggression is defined under the United Nations General Assembly Resolution 3314 (XXIX) to mean the use of armed force by a state against the sovereignty, territorial integrity, or political independence of another state or in any other manner inconsistent with the Charter of the United Nations.<sup>18</sup>

Article 8bis of the Rome Statute defines the crime of aggression to mean the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression, which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.<sup>19</sup> Additionally, an act of aggression means the use of armed force by a State against the sovereignty, territorial integrity, or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations [10].

According to the United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, the following acts qualify as acts of aggression: -

The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof; Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; The blockade of the ports or coasts of a State by the armed forces of another State; An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the

termination of the agreement; The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein<sup>20</sup>.

It is worth noting that under the Rome Statute, the Security Council has the mandate to decide whether the crime of aggression has been committed.<sup>21</sup> Once the Security Council decides that the crime of aggression has been committed, it will automatically trigger the referral of the situation.<sup>22</sup> Although the Rome Statute gives the ability for *proprio motu*<sup>23</sup> exercise of jurisdiction or state referrals, these two are curtailed by the Security Council's power to defer a situation for a period of 12 months, which is extendable.<sup>24</sup> Furthermore, states have the power to opt out of the jurisdiction of the ICC over the crime of aggression by making a declaration.<sup>25</sup>

## 4. The Status of Article 15 Bis 5 and Its Implications

The ICC's aggression jurisdiction remains untested. Arguably, the Russian/Ukrainian war presented the opportunity for the ICC. However, the ICC has no jurisdiction over the crime of aggression since neither Ukraine nor Russia is a state party to the Rome Statute.

Article 15 bis 5 of the Rome Statute states that in respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.

It was contended by Oksana and Kateryna in their article titled, Evidence in International Criminal Court-The role of Forensic Experts: The Ukrainian Context, that the ICC jurisdiction does not extend to the crime of aggression committed on the territory of a state or by citizens of a state that is not a party to the Statute. This rule is generally for states that have not ratified the Statute and have only recognised the jurisdiction of the ICC under Part 2 of Article 12 of the Rome Statute [11].

In plain meaning, the ICC has no mandate to prosecute the crime of aggression when committed by nationals of non-state parties to the ICC. Even if the state decided to become mem-

<sup>16</sup> Article 7(1)(a-k), (n 1).

<sup>17</sup> UN (n 15).

<sup>18</sup> United Nations General Assembly Resolution 3314 (XXIX) of 1974. Article 19 (n 1)

<sup>20</sup> Article 3(a-g), (n 18).

<sup>21</sup> Article 15 bis (7) states Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

<sup>22</sup> Article 15 ter(n 1)

<sup>23</sup> In legal contexts, *proprio motu* describes situations where a judge, prosecutor, or authority initiates an action on their own discretion.

<sup>24</sup> Article 16 (n 1) states that no investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

<sup>25</sup> Article 15 bis(4), (n 1) provides The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.

ber of the ICC the ratification would not have retroactive implication, as stated under article 11(2) of the Rome Statute that if a State becomes a Party to this Statute after it enters into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3<sup>26</sup>. It is cemented by Owo Imoedembe in his article [12]. The principle of non-retroactivity of criminal law connotes that a person can only be criminalized for an act that was already proscribed before the commission of that act.

Article 12(3) declaration can have a retroactive effect, but it does not render the declaring state a state party. As such, it is unlikely that such a declaration can overcome the obstacle posed by Article 15 *bis* (5). Moreover, the terms of article 15 *bis* (5), combined with an understanding embedded in the resolution activating the Court's jurisdiction over aggression (para. 2<sup>27</sup>), would suggest that any path to criminal jurisdiction via article 12(3) would need to come through the ad hoc acceptance of the aggression amendments by both the aggressor state and the attacked state. It is currently inconceivable that Russia or Belarus would grant such consent. Similarly, although jurisdiction over aggression would be straightforward if the United Nations Security Council (UNSC) were to refer the situation (article 15 *ter*)<sup>28</sup>Russia's veto<sup>29</sup> makes that inconceivable under the current system [13].

Russia cannot accept the jurisdiction of the ICC, which makes it difficult for the OTP to investigate and to prosecute the Russians who committed aggression. Even if the Security Council decides to refer the matter to the ICC, it will be impossible because Russia has the veto power in the Security Council, and it will vote in its favour (refusing to be prosecuted).

Ukraine has accepted the jurisdiction of the ICC; hence, the OTP has the mandate to enter Ukraine and investigate the crimes of genocide, war crimes, and crimes against humanity; however, it will not include aggression as per article 15 *bis* 5 of the Rome Statute. Hence, the OTP can prosecute the Russians based on other core international crimes but not aggression, as clearly directed by Rome Statute that the ICC will have no power to prosecute non-state parties for aggression.

Therefore, since Russia is not a party to the ICC, the ICC cannot prosecute Russian leaders for aggression. Russian forces may, of course, be prosecuted for war crimes and crimes against humanity before the ICC, as well as genocide, if the court believes it has occurred in Ukraine. But many people feel that Russia's aggressive attack on Ukraine is the original crime from which these other crimes spring [14]. Article

15 *bis* 5 waves out jurisdiction to ICC to prosecute Russian leaders for aggression, which is the original crime in the situation of Russia's invasion of Ukraine, hence impunity of Russian leaders over the crime of aggression.

Russia's invasion of Ukraine, aided by Belarus, does not just represent the blatant violation of a rule of international law; it represents a threat to the foundational principle that underpins the modern legal order. This is why the global response to the war has been so robust, with States coalescing together to provide arms and other supplies to Ukraine. It is also why these efforts must be followed by the criminal prosecution of those most responsible for the crime of aggression [15]. The international community seeks to see justice served by ensuring that those responsible for the aggression against Ukraine are prosecuted. However, complicating this objective is the fact that the Rome Statute, through Article 15 *bis* 5, restricts the jurisdiction of the ICC to prosecute nationals of non-State Parties for the crime of aggression.

In fact, the invasion of Russia against Ukraine. Ukraine suffered socially and economically, as it was observed that the reorientation of the country's economy under martial law, and the appropriation of Ukraine's budget allocations for education, science, culture, and other socially important areas were cut off [16]. Hence, the Russian aggression against Ukraine brought a lot of difficulties socially and economically. The problem facing the ICC in prosecuting individuals from Russia responsible for aggression is the lack of jurisdiction to prosecute individuals from non-state parties as stipulated under Article 15 *bis* 5 of the Rome Statute.

## 5. The Way Forward

The ICC is involved in the investigation and prosecution of several situations and cases where international crimes have been committed, including investigations into war crimes and crimes against humanity in the Russian invasion of Ukraine. While the ICC has jurisdiction over war crimes and crimes against humanity being committed in Ukraine, the ICC does not have jurisdiction over the crime of aggression. Therefore, ICC has jurisdiction to investigate war crimes and crimes against humanity, but not aggression.

Clearly, by virtue of article 15 *bis* (5) of the Rome Statute, the ICC does not have jurisdiction over the crime of aggression when committed by state nationals who are not parties to the Rome Statute. Hence, ICC lacks jurisdiction over the crime of aggression when committed by nationals of states not

26 If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

27 The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

28 The Court may exercise jurisdiction over the crime of aggression in accordance

with article 13, paragraphs (a) and (c), subject to the provisions of this article. Article 13, paragraphs (a) and (b) state that the court may exercise jurisdiction when the matter is referred to the prosecutor by a member state or United Nations Security Council.

29 The veto power is held by the five permanent members of the UNSC: China, France, Russia, the United Kingdom, and the United States. This power enables any of these nations to unilaterally block the adoption of any substantive resolution, regardless of the level of international support. The veto is rooted in Article 27 of the UN Charter, which requires that substantive decisions receive affirmative votes from at least nine of the fifteen members, including all five permanent members.

party to the Rome Statute.

Anthony Dworkin cemented that ICC can only prosecute individuals for aggression if the state they belong to has joined the court and agreed to give its jurisdiction over aggression. Since Russia is not a member of the ICC, the court cannot prosecute Russian leaders for aggression. Russian forces may, of course, be prosecuted for war crimes and crimes against humanity before the ICC, as well as genocide, if the ICC believes it has occurred in Ukraine. But many people feel that Russia's aggressive attack on Ukraine is the original crime from which these other crimes spring [14].

For instance, in Russia's invasion of Ukraine, the ICC lacks jurisdiction over aggression because neither Russia nor Ukraine is a party to the Rome Statute. Ukraine has accepted the jurisdiction of the ICC; hence, the OTP has the mandate to enter Ukraine and investigate the crimes of genocide, war crimes, and crimes against humanity. However, OTP will not investigate aggression by virtue of article 15 bis 5 of the Rome Statute, since Russia is not a party to the Rome Statute of the ICC. Under treaty law, a state is only bound by a treaty if the state has signed and ratified that treaty.<sup>30</sup>

The way forward was for the UN Security Council to refer the situation to the ICC as per article 15 *ter* 6 of the Rome Statute. The procedure would have vested jurisdiction in the ICC to try Russia's invasion of Ukraine. However, in practice, Russia's veto power within the current system precludes such a referral. The only way of solving the ICC's limited jurisdiction in prosecuting aggression is the amendment of the Rome Statute, particularly Article 15 bis 5, so that the ICC has jurisdiction to prosecute even non-state parties for aggression. It will not act retrospectively but will guarantee jurisdiction of the ICC to prosecute future aggressors.

Article 15 bis 5 should be amended by virtue of Article 121<sup>31</sup> to mandate the ICC to prosecute even non-state parties for the offence of aggression, as the offence itself has negative impacts on the rights of people at large. The concern of the international community is to make the world a peaceful place for everyone to live, but if others commit crimes and are not punished, then the goal of making the world a peaceful place is entirely defeated. Hence, it's proper and fruitful for the Rome Statute to be amended so that the ICC is vested with jurisdiction to prosecute even non-state parties for aggression. This will play a huge role in protecting the world and avoiding impunity.

30 Vienna Convention on the Law of Treaties (adopted 23 May 1969) which entered into force on 27 January 1980 p. 331

31 Article 121(1) After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties. See also Article 121(2-7).

32 Ibid, Article 11 - 16

33 Article 13(b), 15 bis (5), Rome Statute

34 Article 15 bis (6), (7), Rome Statute.

35 Article 15 *ter*, Rome Statute.

36 Article 15 bis 5 In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.

## 6. Conclusion

Russia and Ukraine are non-state parties to the Rome Statute. The Rome Statute, being a treaty, can only bind those who have signed and ratified it.<sup>32</sup> Therefore, under Article 13(b), the ICC cannot exercise jurisdiction over Russia or its nationals.<sup>33</sup> A combined effect of Articles 13(b) and 15bis implies that the ICC may exercise jurisdiction over the crime of aggression committed by nationals of a non-state party or on its territory only with a UNSC referral. It also means that the ICC could exercise jurisdiction once the UNSC decides that a state is responsible for an act of aggression.<sup>34</sup> Regrettably, it is inconceivable that the UNSC would make such a determination, as Russia would veto it.<sup>35</sup>

This article admits that the ICC has no jurisdiction to prosecute non-state parties for aggression<sup>36</sup>. Due to that, the ICC lacks jurisdiction to prosecute the Russians who are responsible for aggression against Ukraine, hence impunity. It is not healthy to leave the ones who are responsible for aggression in Ukraine unpunished, for the reason that the ICC cannot prosecute non-state parties.

The fact that the human cost of armed conflict is such that international law qualifies aggression as the gravest crime possible, genuinely more serious than war crimes. Hence, states are prohibited from using force against the territorial integrity or political independence of any state.<sup>37</sup>

Therefore, failure to prosecute those who are responsible for aggression in Ukraine defeats the goal of the UN of maintaining international peace and security<sup>38</sup>. This article recommends that the Rome Statute should be amended so that the ICC is vested with the power to prosecute even non-state parties for aggression.

## Abbreviations

DRC	Democratic Republic of Congo
FPLC	Patriotiques Pour la Liberation du Congo
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
OTP	Office of the Prosecutor
UN	United Nations

37 General Assembly Resolution 2625 (XXV) of 24 October 1970, Resolution on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nation, provides that Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues. A war of aggression constitutes a crime against the peace, for which there is responsibility under international law. In accordance with the purposes and principles of the United Nations, States have the duty to refrain from propaganda for wars of aggression.

38 Article 1 paragraph 1 of the United Nation Charter.

UNSC United Nations Security Council

## Author Contributions

**Sem Amin:** Conceptualization, Formal Analysis, Methodology, Resources, Writing – original draft, Writing – review & editing

## Conflicts of Interest

The author declares no conflict of interest.

## References

- [1] Mohamed S. A, The International Criminal Court: A Historical Background and Growing Challenges, <https://liberties.aljazeera.com/en/the-international-criminal-court-a-historical-background-and-growing-challenges/> (Accessed on 1 May 2026).
- [2] Kaul. H, International Criminal Court, Max Planck International Law, Heidelberg and Oxford University Press, 2003, <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e42?q=international+criminal+court> (Accessed on 16 January 2026).
- [3] UN, UNRIC Library Backgrounder: Genocide, <https://e4k4c4x9.delivery.rocketcdn.me/en/wp-content/uploads/sites/15/2020/01/genocide-eng.pdf> (Accessed on 4 May 2026).
- [4] Claus K. (2006). The crime of Genocide under the International Law, *International Criminal Law Review*, 6, 461-502. <https://www.legal-tools.org/doc/8799cd/pdf/> (Accessed on 1 May 2026).
- [5] Alamuddin, A. and Webb, P., (2010). Expanding Jurisdiction over War Crimes under Article 8 of the ICC Statute, *Journal of International Criminal Justice*, 8, 1219 – 1243. (Accessed on 2 May 2026).
- [6] Prosecutor v Thomas Lubanga Dyilo ICC-01/04-01/06-2842, <https://www.icc-cpi.int/court-record/icc-01/04-01/06-2842> (Accessed on 22 April 2026).
- [7] Prosecutor v Bosco Ntaganda ICC-01/04-02/06-2359, <https://www.icc-cpi.int/court-record/icc-01/04-02/06-2359> (Accessed on 15 February 2026).
- [8] William Schabas, *Unimaginable Atrocities, Justice, Politics, and Rights at the War Crimes Tribunals*, Oxford University Press, 2012, p. 51-53, <https://academic.oup.com/book/5671> (Accessed 12 December 2025).
- [9] Cherif Bassiouni M, *Crimes Against Humanity in International Criminal Law*, Martinus Nijhoff Publishers, 1999p. 62, [https://books.google.co.tz/books/about/Crimes\\_Against\\_Humanity\\_in\\_International.html?id=MbiedpEFzbYC&redir\\_esc=y](https://books.google.co.tz/books/about/Crimes_Against_Humanity_in_International.html?id=MbiedpEFzbYC&redir_esc=y) (Accessed on 10 March 2026).
- [10] Gift J. K, *National Prosecution of International Crimes in Africa: Laws and Practice from Kenya, Rwanda and Uganda*, Ph.D. Thesis, University of Dar es Salaam, 2017, p. 46.
- [11] Oksana K and Kateryna S, (2022). Evidence in International Criminal Court-The role of Forensic Experts: The Ukrainian Context, *Special Issue Access to Justice in Eastern Europe*, 4-2(17), 52-65. <https://doi.org/10.33327/AJEE-18-5.4-a000435>
- [12] Imoedembe O, (2023). The International Criminal Court: Whether the Crime of Aggression in Ukraine. *International and Comparative Law Review*, 23(1), 27-52. <https://doi.org/10.2478/iclr-2023-0002>
- [13] Tom Dannenbaum, <https://www.justsecurity.org/80626/mechanisms-for-criminal-prosecution-of-russias-aggression-against-ukraine/> (Accessed on 16 December 2022).
- [14] Anthony Dworkin, *Aggression on trial: The tricky path towards prosecuting Russian war leaders*, <https://ecfr.eu/article/aggression-on-trial-the-tricky-path-towards-prosecuting-russian-war-leaders/> (Accessed on 3 January 2023).
- [15] Oona A. Hathaway, *The Case for Creating an International Tribunal to Prosecute the Crime of Aggression against Ukraine*, (Accessed on 3/01/2023).
- [16] Fedchuk, A., Cheberkus, D., & Zhrebchuk, S. (2022). Russian aggression against Ukraine: a new challenge facing Antarctic governance. *Ukrainian Antarctic Journal*, 20(2(25)), 241-253. <https://doi.org/10.33275/1727-7485.2.2022.702>